

October 1, 1999

U.S. Department of Transportation Dockets
 Docket No. FAA- 1999-600 1 - 34
 400 Seventh St., S.W.,
 Room Plaza 401
 Washington, D.C. 20590

OFFICE OF THE
 CHIEF COUNSEL
 RULES DOCKET

1999 OCT -5 A 8: 46

Re: Notice of Proposed Rulemaking, Protection of Voluntarily Submitted Information –
 Docket No. FAA-1999-6001; Notice No. 99-14

Dear Sir or Madam:

On behalf of OMB Watch, I submit this letter to comment on the Federal Aviation Administration's Notice of Proposed Rulemaking concerning Protection of Voluntarily Submitted Information (Docket No. FAA- 1999-600 1; Notice No. 99- 14).

OMB Watch is a nonprofit organization concerned about the federal government's institutional responsiveness to public needs, including those of charities. Most of our energy is devoted to encouraging greater citizen participation in the decision-making activities of our federal government, thereby assuring increased accountability. As the Office of Management and Budget oversees budget, regulation, information collection and dissemination, proposed legislation, testimony from agencies, and much more, it is the main focus of our work. However, we monitor the work of other federal agencies and engage in specific issues areas that further our concerns for greater government access and accountability.

In the Federal Aviation Reauthorization Act of 1996 (Pub. L. 104-264), Congress has directed the Administrator of the FAA not to disclose such information if the Administrator makes certain required findings, including the finding that withholding the information would be "consistent with the Administrator's safety and security responsibilities." (49 U.S.C. § 40123(a)(2)). While OMB Watch recognizes that the FAA must implement this new law, whatever its deficiencies, we nonetheless urge the agency to limit the scope of withheld information to the greatest extent possible.

In the agency's Section-by-Section Analysis, it says of the definition of "voluntary" that "This definition is based in part on the views expressed by courts as to the nature of a "voluntary" submission of information in cases under Exemption 4 to the FOIA (5 U.S.C. § 552(b)(4)). Under that exemption, certain voluntarily provided trade secrets and commercial or financial information are exempt from disclosure under FOIA." We concur in the Reporters Committee for Freedom of the Press' statement of doubt (in its Comments) that "the judicially developed standards for protecting 'voluntarily submitted' commercial and financial information under Exemption 4 would, by analogy, justify a law protecting safety information from public scrutiny. Exemption 4 considers that commercial entities outside the government would only voluntarily submit information that might harm their competitive position if the agency can promise secrecy. That is a far different scenario than this one in which an agency charged with protecting public

safety chooses to seek cooperation from that industry.” Specifically, OMB Watch is deeply concerned by the FAA’s language in its Statement of the Problem :

The FAA notes that §40123 refers to whether disclosure would “inhibit” the voluntary provision of information. In this context, the FAA interprets “inhibit” to mean to discourage or to repress or restrain, but not to mean prevent the provision of information. *The FAA need **only find** that the provision of information would be discouraged, repressed, or restrained, but not necessarily altogether prevented, to designate it as protected under part 193.* This is consistent with the legislative history that refers to the FAA withholding voluntarily provided information if disclosure would “discourage” people from providing it.” (Emphases added)

Section 193.3: Definition of ‘Information.’

In commentary to this section, the FAA promises submitters that it will consider the definition of information to be “inclusive,” covering data, reports, source and other information.

In complying with this law, the FAA should limit the protection of information to that which, if disclosed, would discourage similar important voluntary submissions in the future. It should protect no more information than that. This test should apply to all supplementary information submitted.

Section 193.3: Definition of “Voluntary.”

The FAA’s commentary on the definition of “voluntary” indicates that information may be designated as “voluntary” because it is part of a program, existing or future, that the FAA will use to collect information from willing participants. This is overly broad and needs to be more closely delineated.

Section 193.7: Presumption of non-disclosure of information.

The new disclosure provision in the Federal Aviation Reauthorization Act of 1996 specifically requires the agency to find withholding would be “consistent with safety and security.” The agency’s claim that “it will be infrequent that the FAA will **find** it advisable to *release* the information if the other factors are met” (emphasis added) is deeply troubling and seems inconsistent with the Administrator’s “safety and security responsibilities.” These also include providing the public with safety and security-related information.

The public has a strong interest in access to such information. Moreover, public confidence in the FAA’s handling of safety and security is essential to FAA’s work, and disclosure of relevant information builds and sustains such confidence. OMB Watch does not think that this responsibility has been given sufficient weight.

Section 193.9 Designation of information as protected.

The agency’s commentary states that:

The FAA would publish a proposed designation in the Federal Register and request comment. After comments were received, the FAA would review them and evaluate whether the elements in § 193.5 were met. The Administrator would designate information as protected under this part only if the elements in § 193.5 were met.

If the Administrator found that the elements in § 193.5 were met, an order designating the information as protected would be published in the Federal Register. The order would include summaries of why the Administrator found that the elements were met. By publishing the order in the Federal Register, all interested persons would be able to see that they could provide information under the program and receive the protection described in § 40123 and this part.

It is not clear from this commentary that Comments on its proposed designation will be published in the Federal Register, as should be the case.

It is a matter of some concern, given the agency's statement that "it will be infrequent that the FAA will find it advisable to release the information if the other factors are met" that no burden-of-proof standards are set. It is also a matter of concern that no process is established for the review of designations for a determination of renewal.

Finally, OMB Watch urges that a list of all such designations and any time limitations should be available at all times from the FAA.

Respectfully submitted,
PATRICE McDERMOTT

Patrice McDermott
Information Policy Analyst
OMB Watch
1742 Connecticut Avenue N. W.
Washington, D.C. 20009
202-234-8494